No. 92-1123

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA,
Petitioner,

v.

U.S. PHILIPS CORPORATION, NORTH AMERICAN PHILIPS CORPORATION, N.V. PHILIPS GLOEILAMPENFABRIEKEN,
and
WINDMERE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the court of appeals should have permitted Petitioner to oppose Respondents' motion to vacate the district court judgment.

2. Whether the court of appeals erred in vacating the district court judgment when the parties to the appeal settled.

STATEMENT PURSUANT TO RULE 29.1

As set forth in the Petition for Certiorari, Izumi Seimitsu Kogyo Kabushiki Kaisha has no parent or subsidiary companies.

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OPINIONS BELOW

The opinion of the court of appeals (see Petitioners Appendix, hereinafter "Pet.", A1-A6) is reported at 971 F.2d 728. The judgments of the District Court for the Southern District of Florida (Pet. A7-A8; Joint Appendix, hereinafter "J.A." 126a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1992. This Court has jurisdiction under 28 U.S.C. § 1254. The petition for a writ of certiorari was filed on December 30, 1992, and granted on February 22, 1993.

STATEMENT OF THE CASE

1. The District Court Action

Petitioner Izumi Seimitsu Kogyo Kabushiki Kaisha ("Izumi") manufactures rotary electric shavers and has sold them to distributors in the United States. These distributors include Respondent Windmere Corp., which has sold Izumi shavers under the names Ronson and Windmere, and Sears, Roebuck & Co. ("Sears") (Pet. A13-14; Pet. A22-23). This appeal arises out of a suit in the U.S. District Court for the Southern District of Florida which involved (1) the claim of North American Philips Corporation, one of the Respondent Philips companies[1] (collectively "Philips") against Izumi and Windmere for patent infringement, (2) U.S. Philips' claim against Windmere, alleging infringement of the trade dress rights Philips claimed for the configuration of its Norelco® rotary shaver and (3) Windmere's antitrust counterclaims against Philips (J.A. 12a-20a). An indemnity agreement between Izumi and Windmere required Izumi to pay for Windmere's defense of the trade dress infringement and patent claims, and Izumi did so (Pet. A11; Pet. A14). Windmere

[1] U.S. Philips Corporation, North American Philips Corporation and N.V. Philips Gloeilampenfabrieken.

undertook the expense of prosecuting its antitrust counterclaims.

There were two jury trials. These resulted in (1) judgment for Philips on its patent claim, (2) judgment against Philips on its trade dress claim, and (3) judgment for Windmere on its antitrust claim against Philips.

More particularly, in the first trial, Philips prevailed on its patent infringement claim against Izumi and Windmere, but was awarded only $6,500.00 in damages (J.A. 21a). Neither party appealed that verdict. The jury rejected Philips' trade dress claim, finding that Philips' alleged trade dress was legally functional and, hence, was unprotectable (Pet. A28-29; J.A. 148a). Windmere's antitrust counterclaim was initially rejected by the Florida district court in a directed verdict and therefore was not presented to the jury in the first trial (J.A. 45a).

A second trial was held for two reasons. First, on a certified interlocutory appeal, the Federal Circuit held that Windmere's antitrust counterclaim stated a triable issue (J.A. 45a). Second, separately from the Federal Circuit's ruling on Windmere's antitrust claims, the Florida district court ordered a new trial on Philips' trade dress claim (J.A. 25a). Both the trade dress and antitrust claims were therefore tried to a second jury.

The second jury, like the first, found that Philips' trade dress was functional and, hence, unprotectable (J.A. 121a). The jury also found for Windmere on its antitrust counterclaims and awarded Windmere $89,644,257 in trebled damages, plus attorneys fees, interest and costs (Pet. A7). Following the verdicts in the second trial, the Florida district court rejected Philips' motions for JNOV and new trial and entered

judgment in Windmere's favor on both Philips' trade dress claim and Windmere's antitrust counterclaim (J.A. 126a).

2. The Philips/Windmere Settlement

Philips appealed to the Federal Circuit seeking to overturn both the trade dress and antitrust verdicts. On May 6, 1992, however, after the appeal had been fully briefed, Philips settled, agreeing to pay Windmere $57 million (J.A. 158a-159a). Windmere agreed to join Philips in asking the Federal Circuit to vacate the Florida district court's judgment, although the settlement was not conditioned on the grant of the motion to vacate (J.A. 159a).

One of Philips' explicit objectives was to nullify the Florida judgment. The Settlement Agreement states that:

> It is the intention of all parties to this Settlement Agreement that the Judgment, the opinion and the jury interrogatories on [Philips'] unfair competition [trade dress] claim and Windmere's antitrust claim will be of no force and effect and shall have no precedential or other value, including, without limitation, any effect under the doctrines of collateral estoppel or res judicata.

(J.A. 159a-60a). Philips had far more than an academic interest in having the Florida judgment vacated through its settlement with Windmere. Philips was attempting to free itself of the collateral estoppel effect of the Florida judgment, which already had been applied against Philips in a case brought by Philips in federal court in Illinois.

3. The Illinois District Court Litigation

In 1985, while the Florida action was pending, Philips brought a similar action for patent infringement and trade dress infringement against Izumi and another of its

distributors, Sears, in the United States District Court for the Northern District of Illinois (Pet. A23). Following the judgment in the second jury trial in Florida, the Illinois district court held that Philips' trade dress claim against Sears was barred by collateral estoppel, because the functionality, and hence unprotectability, of Philips' trade dress was already established in the Florida case (Pet. A28-A30). Philips' effort to vacate the Florida judgment, therefore, was designed to reinstate its trade dress claim against Sears in Illinois.

Besides seeking to avoid *defensive* collateral estoppel on its trade dress claim in Illinois, Philips also sought to avoid *affirmative* collateral estoppel on an antitrust counterclaim brought by Izumi in the Illinois case, a claim that was similar to Windmere's successful antitrust claim in the Florida case. The Illinois district court refused to hear Izumi's antitrust claim on the ground that it was a compulsory counterclaim to Philips' patent claim against Izumi in the Florida action and therefore should have been brought in Florida. Nonetheless, Philips recognized that, on appeal, the Federal Circuit might allow Izumi to bring its antitrust counterclaim in Illinois, and if so, Izumi might invoke offensive collateral estoppel to preclude Philips' relitigation of the antitrust issues. Philips' motion to vacate the Florida judgment was therefore designed to prevent Izumi's, as well as Sears', use of that judgment in Illinois.

4. Izumi's Attempt to Oppose Vacatur

Izumi first learned that Philips and Windmere had settled their entire dispute on May 8, 1992 (J.A. 167a). The terms of the settlement were not disclosed to Izumi's counsel at that time. Three days later, on May 11, 1992,

Izumi learned that Philips and Windmere were seeking to vacate the Florida judgment. On that day, Philips and Windmere jointly moved to dismiss the Federal Circuit appeal as moot and to vacate the Florida judgments ("Philips/Windmere motion to vacate") (J.A. 167a).

Izumi had known of Philips' and Windmere's interest in settlement prior to the May 11 settlement date. On March 30, 1992, Izumi received a letter from Edward L. Foote, of the law firm of Winston & Strawn, the attorneys who had been representing both Izumi and Windmere in the Florida litigation (J.A. 169a). Mr. Foote informed Izumi that Philips and Windmere had agreed to financial terms for a possible settlement. Mr. Foote also told Izumi that "other negotiations . . . involving what to do with the outstanding judgment . . . will also proceed" (J.A. 169a). He further said that the ongoing settlement discussions could involve terms and conditions potentially adverse to Izumi's interest, that consequently, he could no longer represent Windmere in these negotiations, and that the negotiations would thereafter be undertaken by other attorneys directed solely by Windmere and who represented Windmere only (J.A. 169a).

From that point forward, until May 11, when the Philips/Windmere motion to vacate was filed, Izumi was left almost entirely in the dark as to the status and substance of the settlement negotiations. Izumi did not know that Philips and Windmere would act in concert to vacate the final judgment. Nor did Izumi have the opportunity to influence the terms of the settlement.[2]

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[2] For example, in early April, 1992, Windmere's president suggested to Izumi's regular American attorney, William Androlia, that vacatur might be included among the terms of settlement. Mr.

[footnote continued]

Upon learning of the Philips/Windmere motion to vacate, Izumi promptly attempted to oppose the motion (J.A. 162a-63a).[3] Izumi pointed to its involvement in the defense of Philips' trade dress claim against its distributor and indemnitee, Windmere. Izumi also cited its obvious and direct interest in preserving the finality of the Florida judgments in light of the *Sears* case in Illinois, where Izumi indemnified Sears in that suit just as it indemnified Windmere in the Florida case. Nevertheless, the Federal Circuit refused to allow Izumi to intervene to oppose vacatur.

Having held that Izumi did not have standing to oppose the Philips/Windmere motion to vacate either as a party to the original district court action, as an affected third party, or as an intervenor (Pet. A2-A5), the Federal Circuit nevertheless addressed the merits of Izumi's opposition. However, even though vacatur created the prospect of duplicating in Illinois the lengthy and complex trial conducted in Florida, the Federal Circuit granted the motion to vacate (Pet. A5-A6).

5. The Basis of the Federal Circuit's Decision

On the question of Izumi's intervention, the Federal Circuit rejected as bases for intervention Izumi's support of the defense of the trade dress claim and the effect on Izumi of its outcome. The court explained that:

Androlia made clear that Izumi opposed vacatur and desired to preserve the Florida judgment intact (J.A. 167a). As is now evident, Izumi's protests carried little force with Windmere or Philips.

[3] Izumi correctly feared that Philips would seek to revive its trade dress claims in the Illinois action, thus exposing Izumi to the risk and expense of defending yet another action in which it indemnifies another of its distributors, Sears.

> We do not discern in Izumi's financial support of Windmere the authority to intervene in this court. . . . Any financial or commercial interest Izumi might have in the unfair competition claim does not confer standing as a party, on the posture of this case.

(Pet. A4). The Federal Circuit further faulted Izumi for not intervening earlier (Pet. A4), even though Izumi had not learned of the settlement terms until May 11 and had lodged its opposition as promptly as possible (J.A. 162a).

On the merits of vacatur, the Federal Circuit recognized that at least four other courts of appeals have declined to vacate judgments merely because parties had settled their disputes.[4] Nonetheless, the court followed its "general rule" of vacating judgments following settlement.[5] Citing this Court's decisions in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936); and *City Gas Co. of Florida v. Consolidated Gas Co. of Florida, Inc.*, 111 S. Ct. 1300 (1991), the Federal Circuit held that vacatur was appropriate because all claims on appeal had been rendered moot by settlement (Pet. A5-6). Moreover, even though settlement had not been conditioned on the court granting the motion to vacate, the court held that "The parties . . . are entitled to rely on our precedent," which it said requires vacatur when the parties settle all claims on appeal (Pet. A6).

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[4] *See Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127 (3d Cir. 1991); *In re United States*, 927 F.2d 626 (D.C. Cir. 1991); *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989); *In re Memorial Hosp.*, 862 F.2d 1299 (7th Cir. 1988).

[5] The Federal Circuit is joined by the Second Circuit in routinely vacating final judgments following settlement by the parties. *See Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280 (2d Cir. 1985).

6. The Effect of the Federal Circuit's Decision

Once the Florida court's judgment was vacated, Philips moved the Illinois district court to reinstate Philips' trade dress claim against Sears, arguing that the vacated Florida judgment should no longer have collateral estoppel effect. The Illinois court agreed and reinstated the claim (Pet. A43-A44). On Izumi's challenge, the district court certified, and the Federal Circuit accepted, an appeal from the reinstatement. That appeal has been stayed pending decision in this case. Thus, the grant of the Philips/Windmere motion to vacate not only resulted in the dismissal of Philips' appeal in the Federal Circuit but has renewed the prospect of a trade dress trial in Illinois.

SUMMARY OF THE ARGUMENT

In denying Izumi even the right to intervene, the Federal Circuit disregarded the direct and substantial interests of Izumi in both the conduct and outcome of this litigation and Izumi's need to present an opposition to the Philips/Windmere motion to vacate. While the circuit court emphasized that Izumi was not a party to the claims on appeal, Izumi's interests and the lack of representation of those interests in the otherwise unopposed motion to vacate are precisely the reasons third parties such as Izumi are permitted to intervene. The court below was clearly in error in denying Izumi the right to oppose the motion to vacate.

The Federal Circuit also erred in granting the Philips/Windmere motion. The practice of the Federal Circuit is to routinely grant a motion, brought by all parties to the appeal, to vacate the district court judgment on the basis of a settlement which moots the entire action on appeal.

Although the Federal Circuit relies upon this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), as authority for its practice, that case does not address the circumstance of settlement. Moreover, in *Karcher v. May*, 484 U.S. 72 (1987), the Court interpreted *Munsingwear* as requiring vacatur only when mootness occurs beyond the control of the parties—a circumstance not involved in settlement. In short, this Court's precedents do not provide authority for the Federal Circuit's practice of routinely vacating district court judgments at the request of settling parties.

Other circuit courts, in a more reasoned approach than the Federal Circuit's automatic vacatur rule, have considered facts and circumstances which demonstrate private or public interest in preserving the district court judgment, including the adverse effects of vacatur on third parties, the public, and judicial economy. These factors should have been considered here, and the motion to vacate the district court judgment against Philips on the trade dress and antitrust issues should have been denied.

The vacatur has had a direct and immediate impact on other litigation, requiring Izumi and Sears to expend more time, effort and expense on that litigation. It does not enhance judicial economy. The Federal Circuit's order has increased the prospect of at least one further trial on the same issues. The resources that will have to be devoted in that trial will far eclipse any savings achieved by vacating the Florida judgment and dismissing Philips' appeal.

The Federal Circuit could have achieved true judicial economy by dismissing Philips' appeal without vacating the judgment below. Such action would neither have burdened the courts not have discouraged settlement

because the Philips/Windmere settlement agreement was not contingent on the Federal Circuit's granting the motion to vacate. Furthermore, the public has a demonstrable interest in preventing parties from asserting invalid trade dress rights and in redressing antitrust violations, and thus will benefit from preserving the Florida judgment.

The Federal Circuit committed errors of law in refusing to hear Izumi's opposition and in granting the Philips/Windmere motion to vacate solely because the action on appeal was mooted by settlement. Accordingly, the Court is respectfully urged to reverse the decision below and mandate that the Philips/Windmere motion to vacate be denied.

ARGUMENT

I. Izumi Has the Right to Intervene

As Respondents conceded in their opposition to certiorari, (Joint Brief of Respondents in Opposition, hereinafter "Opp.", at 5), the denial of Izumi's motion to intervene is a matter that can properly be reviewed by this Court. *Marino v. Ortiz*, 484 U.S. 301, 304 (1988); *International Union, UAW v. Scofield*, 382 U.S. 205, 209 (1965).

A. Intervention Is Warranted Under The Present Circumstances

In holding that Izumi lacks standing to intervene, the Federal Circuit dismissed Izumi's substantial involvement in the Florida litigation, both as the manufacturer of the shavers accused of infringing Philips' alleged trade dress rights, and as the party who fully funded Windmere's

defense against that trade dress claim. The court erred in so holding.

This Court has said that, in determining whether a party should be permitted to intervene in an appeal, the policies underlying Rule 24(a)(2) of the Federal Rules of Civil Procedure provide guidance. *International Union, UAW*, 382 U.S. at 217, n. 10. The rule permits intervention as of right when:

> (1) the applicant claims an interest relating to the property or transaction which is the subject of the action;
>
> (2) applicant is so situated that the disposition of the action may as a practical matter impair the applicant's ability to protect that interest; and
>
> (3) applicant's interest is not adequately represented by existing parties.

Under these criteria, a party that funds litigation and that will be affected in other lawsuits by the collateral estoppel implications of a judgment has an interest that justifies intervention as of right. *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984).

Triax was a patent infringement action in which the district court granted summary judgment holding certain patents invalid. The plaintiff Triax, the assignee of the patents, declined to appeal. Lemelson, the assignor of the patents, though not previously a party to the litigation, moved to intervene for purposes of appealing the invalidity holdings. The Sixth Circuit held that Lemelson had a right to intervene in view of:

> (1) his substantial interest in the litigation—Lemelson had paid 40 percent of the plaintiff's litigation costs and had actively participated in the case;
>
> (2) the substantial risk that his interests would be impaired by the district court judgment, which would preclude him from collecting royalties and from asserting his patents against other infringers; and
>
> (3) the fact that his interests were no longer being adequately protected by the plaintiff, who had decided not to appeal from the district court's ruling.

Id. at 1227.

Izumi's interests supporting intervention are even more compelling than were Lemelson's. Izumi manufactures the products which were the subject of the Florida actions and would have been required to indemnify Windmere had Windmere been held liable for infringement. Moreover, if Windmere had been enjoined from selling Izumi-manufactured razors, Izumi's business would have suffered still further injury.

Izumi was also responsible, by virtue of its indemnity agreement with Windmere, for paying for Windmere's defense of the trade dress charges leveled against Windmere by Philips, including the cost of the appeal on the trade dress claim. Moreover, Izumi was not a detached observer during the two Florida jury trials. Izumi was a party to the patent claim in the first trial and actively participated in the trial of the trade dress claim and antitrust counterclaim during both the first and second jury trials. It is unlikely that there would be a nonparty having a more direct and intimate involvement in a liti-

gation, and a more direct stake in its outcome, than Izumi.[6]

At the time Izumi moved to intervene, Windmere had not only ceased representing Izumi's interest, but had just taken a step directly adverse to Izumi—joining Philips in the motion to vacate. Windmere chose, through the decision to join Philips in moving to vacate the judgment of the Florida district court, to pursue its private financial interests at Izumi's expense and to Izumi's profound prejudice. The Federal Circuit failed to properly appreciate Izumi's interest in the Florida litigation, and improperly minimized the extent to which that interest would be harmed by vacating the Florida judgment.

The Federal Circuit's order severely harms, rather than benefits, Izumi. The order creates the prospect of Izumi having to bankroll yet another costly defense against the same claim. Izumi opposed the Philips/Windmere motion to vacate because it recognized that vacatur would jeopardize the collateral estoppel effect of the Florida judgment, and might enable Philips to revive its trade dress claims against another distributor of Izumi shavers, Sears, in Illinois. This scenario now looms in the wake of the Federal Circuit's order, with the Illinois district court

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[6]For further examples of situations where a nonparty was permitted to intervene on appeal, *see Goodman v. Hueblein, Inc.*, 682 F.2d 44 (2d Cir. 1982) (nonparty attorneys permitted to intervene to defend attorney fee award when plaintiff refused to defend appeal of fee award); *United States v. Bursey*, 515 F.2d 1228, 1238 & n.24 (5th Cir. 1975) (nonparty permitted to intervene on appeal to oppose district court order, without notice, disposing of appearance bond); *Hurd v. Illinois Bell Telephone Co.*, 234 F.2d 942, 944 (7th Cir. 1956) (nonparty pensioner granted permissive intervention on appeal even though not bound by judgment, because the case was "fraught with elements of possible prejudice to petitioner.").

having ruled that the Florida judgment no longer bars Philips' trade dress claim against Sears.

The Federal Circuit's order also casts a cloud over Izumi's entire rotary shaver business in the United States. The Florida judgment, if left undisturbed, would permit Izumi to sell these shavers in the United States through other distributors like Windmere and Sears, free from further interference from Philips. On the other hand, in view of Philips' past action, the vacatur of the judgment raises the spectre of lawsuits by Philips against any distributor who agrees to carry Izumi rotary shavers.

For these reasons, it is evident that the Federal Circuit's action will significantly impair Izumi's interests within the meaning of Fed. R. Civ. P. 24(a)(2).

B. Izumi's Motion to Intervene Was Timely

The Federal Circuit also erred in questioning the timeliness of Izumi's motion to intervene. A motion to intervene is timely, even at a late stage in the proceedings, if the potential intervenor promptly moves to intervene after learning that its interests are no longer being protected by its previous representatives. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977); *See, e.g., Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 934 F.2d 1092, 1095-96 (9th Cir. 1991) (motion to intervene was timely 16 years after complaint was filed and 10 years after consent decree was entered); *Triax*, 724 F.2d at 1228-29.

Here, Izumi's interests were fully represented by its indemnitee, Windmere, throughout the Florida litigation, and through the briefing of the appeal to the Federal Circuit. Indeed, Izumi and Windmere were represented by the same law firms. Izumi's interest did not

diverge from Windmere's until Windmere aligned itself with Philips' effort to vacate the Florida judgments. Before then, Izumi had no reason to intervene either in the appeal or at the trial below. As soon as it became clear from the Philips/Windmere motion to vacate that Windmere's positions and actions in the lawsuit no longer coincided with Izumi's interests, Izumi acted to intervene and oppose the motion. Izumi's efforts to intervene were timely.

The Federal Circuit's refusal to even allow Izumi to intervene deprived the entity with the greatest interest in opposing vacatur the opportunity to do so. The Federal Circuit's order was therefore inconsistent with the fundamental interests of justice and the adversarial system, and constitutes an abuse of discretion. Accordingly, the Court should reverse the decision of the Federal Circuit, hold that the Federal Circuit should have granted Izumi's motion to intervene, and accord Petitioner standing as an intervening party to oppose the Philips/Windmere motion to vacate.

II. The Federal Circuit Committed Reversible Error in Granting the Motion to Vacate

This Court granted certiorari on the question of whether the circuit courts of appeals should routinely grant a motion to vacate the district court judgment brought by parties on appeal who settle the litigation. For the reasons developed herein, Petitioner submits that such routine vacatur on settlement should be rejected. That practice, adopted by the Federal Circuit and applied in this case, fails to take into account the interest of affected third parties, judicial efficiency and the public. Thus, the Federal Circuit's practice results in vacatur even

when, as here, vacatur is inimical to these important interests. The Federal Circuit's decision in this case should be reversed and the Philips/Windmere motion to vacate denied.

A. The Federal Circuit's Practice Is to Routinely Vacate the District Court Judgment Whenever Settlement Moots the Action on Appeal

Instead of weighing all relevant facts and circumstances, the Federal Circuit in the opinion below followed its consistently held view that:

> [V]acatur of the judgment at trial is appropriate when settlement moots the action on appeal. *Federal Data Corp. v. SMS Data Products Group, Inc.* [sic] 819 F.2d 277, 280 (Fed. Cir. 1987); *Smith Int'l. Inc. v. Hughes Tool Co.*, 839 F.2d 663, 664 (Fed. Cir. 1988).

(Pet. A5). Based on this precedent, the Federal Circuit focused its analysis of the Philips/Windmere motion to vacate exclusively on whether their settlement mooted the action on appeal. The court concluded that:

> Although in the Federal Circuit vacatur is the general rule, we do not hold that vacatur must always be granted, whatever the circumstances. In this case, however, as in *Federal Data Corp.* and *Smith International*, the settlement between Philips and Windmere includes all the parties to the appeal. All of the claims of the judgments were appealed, and have now become entirely moot. *See Munsingwear.* The parties to this appeal are entitled to rely on our precedent. Vacatur of the judgments on appeal is appropriate.

(Pet. A6). Thus, by its terms the Federal Circuit's opinion declares vacatur mandatory whenever all parties to the appeal have settled all their claims on appeal.

The prior Federal Circuit decisions cited by the circuit court confirm that the court's practice is to automatically grant settling parties' motion to vacate. For example, *Federal Data* involved an appeal from the decision of the Board of Contract Appeals not to vacate its own decision at the request of the parties to a contract bid protest action who reached a settlement. The Board had weighed the parties' private interest and the public interest in settlement against public policy considerations and concluded that it would be against the public interest to vacate the Board decision. 819 F.2d at 278-79.

The Federal Circuit in *Federal Data* rejected the Board's rationale, citing *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985). 819 F.2d at 279-80. In *Nestle*, the Second Circuit Court of Appeals held that it was an abuse of discretion for the district court to refuse to vacate on the ground that the public interest in preserving the judgment was greater than the parties' interest and desire. The Second Circuit viewed the district court's decision as having the effect of forcing the parties to bear the costs and risks of further litigation against their will. Adopting the Second Circuit's reasoning, the Federal Circuit considered it unjust and wasteful of judicial resources to require the parties in *Federal Data* who had settled their differences to continue to litigate. 819 F.2d at 280.

Although the Federal Circuit stated that "we do not view vacatur as automatic under all circumstances" (Pet. A5) and "we do not hold that vacatur must always be granted, whatever the circumstances" (Pet. A6), those statements do not mean that the Federal Circuit applied

anything other than an automatic vacatur rule *here*, *Contra*, Opp. at 8. Those statements simply preserve non-vacatur for other situations, such as where not all parties to an appeal have settled or where not all claims on appeal have been settled. The Federal Circuit, immediately after those statements, went on to say that vacatur *was* required here because all parties to the appeal had settled all their claims on appeal, and that is the rule established by the cited precedents. Thus, the decision to vacate here does not rest on any weighing of case-specific facts or circumstances, but only on a rule treating vacatur as automatic when an entire case on appeal is mooted by settlement.

B. The Federal Circuit's Practice of Vacatur on Settlement Is Based on an Erroneous Interpretation of Supreme Court Cases

The Federal Circuit relies upon certain decisions of this Court as the authority for routinely vacating district court judgments when a settlement moots the action on appeal. In the opinion below, the circuit court held that:

> Authority is found in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950) and *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936), which provide that judgments should in general be vacated when the case becomes moot. In *City Gas Co. of Florida v. Consolidated Gas Co. of Florida*, 111 S. Ct. 1300 (1991) the Court summarily vacated a decision of the Eleventh Circuit and ordered the appellate court to dismiss the case under *Munsingwear*, apparently because the parties had settled. *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 931 F.2d 710 (11th Cir. 1981) (on remand from Supreme Court).

(Pet. A5).

As explained further below, however, the *Munsingwear* case does not apply to mootness arising out of a settlement, and neither the older *Duke Power* decision nor the summary order in *City Gas* requires vacatur when parties settle. Indeed, as the Federal Circuit acknowledged, "some circuits have declined to vacate judgments merely because the parties settled their dispute," citing decisions of the Third, Seventh, Ninth and D.C. Circuits (Pet. A5). Thus, the Federal Circuit's interpretation of this Court's decisions as holding that the district court judgment should be vacated whenever there is a settlement which renders the action on appeal moot is not uniformly accepted among the circuit courts, has been specifically rejected by other circuit courts, and is submitted to be in error.

1. *Munsingwear* Does Not Involve Settlement

The *Munsingwear* case has been recognized as "perhaps the leading case on the proper disposition of cases that become moot on appeal." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 at* (1979). However, contrary to the Federal Circuit's interpretation, *Munsingwear* does not require or provide authority for vacatur whenever a case becomes moot on appeal because the parties have settled. Mootness can arise in ways other than through the voluntary settlement of the dispute by the parties to an appeal, such as through an action beyond the control of either party. In *Munsingwear*, mootness came about through a change in law which eliminated the controversy on appeal, and the opinion discusses vacatur in that context. It does not address mootness caused by settlement.

In *Munsingwear*, the U.S. Government had appealed a district court decision finding that Munsingwear's prices did not violate a pricing regulation that was in force

at the time of the litigation. During the pendency of the appeal, the Munsingwear products at issue were deregulated. Although the U.S. Government still disagreed with the district court's decision, and wished to pursue that disagreement, the appeal was dismissed as moot. In that circumstance, the Court in *Munsingwear* stated that vacating the district court judgment "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* at 40.

In a voluntary settlement, the district court judgment does not become *unreviewable* because of circumstances beyond the control of the parties, *i.e.*, happenstance. Thus, the Federal Circuit was in error in interpreting *Munsingwear* as authority for vacatur on settlement.

2. *Karcher* Confirms the Distinction Between *Munsingwear* "Happenstance" and Actions Within the Control of the Parties

In *Karcher v. May*, 484 U.S. 72, 82-83 (1987), the Court confirmed that *Munsingwear* concerns only mootness by "happenstance" and not mootness created by the parties. *Karcher* involved a challenge to a New Jersey state statute permitting a minute of silence in public schools. After the named defendants declined to defend the action, the presiding legislative officers intervened as defendants. The district court declared the state statute unconstitutional, and the Third Circuit affirmed.

While the *Karcher* case was pending before the Supreme Court, the intervenors lost their posts as presiding officers. The new presiding officers voluntarily withdrew the appeal leading to dismissal of the appeal for lack of

jurisdiction. However, the intervenors asked the Court to vacate the lower court judgments of unconstitutionality. This Court rejected that request, distinguishing the voluntary withdrawal of the appeal from the "happenstance" which caused mootness in *Munsingwear*, holding that:

> This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party – the New Jersey Legislature – declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.

Id. at 83.

There is no meaningful distinction between the facts of *Karcher*, where the appellant voluntarily dismissed its appeal, and the present case, where Philips and Windmere have settled their dispute, moved to dismiss the appeal and for vacatur, but have not conditioned settlement on their motion to vacate being granted. Hence, *Munsingwear* not only fails to provide authority for granting the motion to vacate here, but *Karcher* is authority for *refusing* to do so.

3. *Duke Power* Does Not Mandate Vacatur Where Settlement Is Involved

The Federal Circuit also cited *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267-68 (1936) as supporting vacatur following settlement. In *Duke Power*, the Court said that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Id.* at 267. However, as with *Munsingwear*, *Duke Power* involved mootness caused by a change in the underlying

circumstances – not a settlement entered into by the parties. *Duke Power* does not create a duty on the part of the appellate court to vacate a district court judgment when the parties settle.

4. The Summary Order in *City Gas* Does Not Provide Authority for the Federal Circuit's Automatic Vacatur Rule

Lastly, the Federal Circuit cited *City Gas Co. of Florida v. Consolidated Gas Co. of Florida, Inc.*, 111 S. Ct. 1300 (1991), as authority for its vacatur practice. *City Gas* and other such summary orders cannot fairly be interpreted as this Court's definitive pronouncement that vacatur is required whenever disputes are settled while on appeal. Indeed, the Court has acknowledged that its summary decisions are of limited precedential value; they do not foreclose the Court from considering more fully questions previously disposed of summarily. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 309 n.1 (1976); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

For these reasons, Petitioner submits that the Federal Circuit's practice of routinely vacating judgment when the parties settle cannot be grounded on this Court's precedent.

C. The Federal Circuit Is in Error in Granting Vacatur Merely Because the Parties Settle and Request It

The Federal Circuit takes an extreme position on vacatur in granting the motion to vacate whenever the parties settle the action on appeal. Other circuit courts of appeals recognize that vacatur is not mandatory when the action on appeal becomes moot due to settlement. For example, in *In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991), the court denied a motion to vacate and held that "[w]e do not believe that vacatur is appropriate, . . . when a matter has been mooted after judgment only because the parties have entered into a settlement."

Some courts routinely *deny* motions to vacate based on settlement.[7] Others seek to balance the parties' private interest in vacatur against the facts bearing on the public interest in preserving the district court judgment.[8] These courts take a more reasoned approach than the Federal Circuit. In deciding whether to grant the parties' motion to vacate, these courts correctly consider the possible adverse effects of vacatur on third parties, the public, and judicial efficiency, and give weight to the benefits of preserving the finality of the district court judgment.

The Seventh Circuit's decision in *Memorial Hospital* illustrates this approach. There, the court explained the importance of looking beyond the interests of the parties

[7] *See Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir. 1991); *In re Memorial Hosp.*, 862 F.2d 1299, 1301 (7th Cir. 1988).

[8] *See In re United States*, 927 F.2d at 628; *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982).

seeking vacatur, to consider vacatur's impact on future litigants and the courts:

> When the parties' bargain calls for judicial action . . . the benefits of settlement to the parties are not the only desiderata. The pact may affect third parties. . . . [I]t may be inappropriate to approve a settlement that squanders judicial time that has already been invested. The bankruptcy and district judges devoted many hours to this case and resolved it on the merits. Their decisions have persuasive force as precedent that may save other judges and litigants time in future cases.

862 F.2d at 1302.

The interests in preserving the finality of judgment and sparing future litigants from the burdens of having to defend against previously adjudicated claims have figured prominently in other decisions in which an automatic vacatur rule has been rejected. In *National Union*, the court refused to vacate a judgment adverse to the plaintiff because there were related actions brought by the plaintiff against third parties who had intervened in the motion to vacate for the express purpose of preserving that judgment. The court emphasized that "[t]o the extent there may be preclusive effect, National Union should not be able to avoid those effects through settlement and dismissal of the appeal."[9]

[9] 891 F.2d at 769. *Cf. Harrison Western Corp. v. United States*, 792 F.2d 1391 (9th Cir. 1986), which involved a dispute arising out of a government contract. The Government executed a second contract thereby precluding it from bringing any action related to the first. With no possibility of relitigation, the court vacated.

The Ninth Circuit in *Ringsby Truck Lines* had earlier recognized that automatic vacatur plays havoc with the important interest of judicial finality:

> If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books. "It would be quite destructive to the principle of judicial finality to put such a litigant in a position to destroy the collateral conclusiveness of a judgment by destroying his own right of appeal." 1B Moore's Federal Practice ¶0.416[6] at p. 2327 (2d ed. 1982). That possibility would undermine the risks inherent in taking any controversy to trial and, in cases such as this one, provide the dissatisfied party with an opportunity to relitigate the same issues. [Footnote omitted.]

686 F.2d at 721.

The Federal Circuit's approach precludes consideration of the many factors which are crucial to assessing whether a motion to vacate should be granted where the parties settle. If the Federal Circuit had considered the facts and circumstances of this case, it could not properly have vacated the Florida judgments.

D. Under the Facts and Circumstances Here, the Philips/Windmere Motion to Vacate Could Not Reasonably Have Been Granted

1. Philips Should Not Be Able to Use Vacatur to Avoid the Preclusive Effects of the Florida Judgment

A losing party should not be permitted to destroy the preclusive effect of an adverse judgment by deliberately mooting questions on appeal and requesting vacatur, thus "retiring to lick its wounds, fully intending to come out fighting again."[10] Here, there can be no doubt that Philips seeks, through vacatur, to eliminate the preclusive effect of the Florida judgment holding Philips' trade dress invalid and unenforceable to the direct and serious detriment of others who were not parties to the Settlement Agreement, including Izumi and its customer Sears.

Until the Federal Circuit's ruling, the Florida judgment had precluded Philips from pursuing its trade dress action in the Illinois district court against Sears. Once the Federal Circuit issued its order vacating the Florida judgment, Philips immediately "came out fighting" in the Illinois action, successfully moving the Illinois district court to reinstate Philips' trade dress claim. In addition, Philips sought to eliminate the preclusive effect of the Florida antitrust judgment. In short, Philips seeks to use vacatur for both offensive and defensive purposes; posturing itself for a second chance at issues which have already been fully litigated and decided against Philips.

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[10] *Harris v. Board of Governors of the Federal Reserve System*, 938 F.2d 720, 724 (7th Cir. 1991). *See also Commodity Futures Trading Comm'n v. Board of Trade*, 701 F.2d 653, 656 (7th Cir. 1983); *State of Wisconsin v. Baker*, 698 F.2d 1323, 1330-31 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983).

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), however, this Court recognized the unfairness of requiring defendants to relitigate issues decided in prior litigation:

> In any lawsuit where a defendant . . . is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses – productive or otherwise – to relitigation of a decided issue.

402 U.S. at 329.

To the same effect, the Court has explained the importance of the collateral estoppel doctrine:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153-54 (1979).

Ignoring these important considerations, the Federal Circuit applied its automatic vacatur rule, even though it was clear that Philips would attempt to relitigate its trade dress claim in Illinois. Izumi has already spent millions of dollars to defend Philips' trade dress claim and thereby pave the way for Izumi rotary shavers to be sold by Sears and other distributors. The Federal Circuit's order unfairly burdens Izumi and Sears by diminishing the value of Izumi's substantial investment in securing the

Florida judgment, and could also require Izumi to further drain its resources to support Sears' defense to Philips' revived trade dress claim in Illinois.[11]

Respondents may argue that it would be unfair to saddle litigants who settle with the preclusive and precedential effects of an unreviewed judgment. However, where an appellant causes the dismissal of its own appeal, it is in " 'no position to complain that [its] right of review . . . has been lost.' "[12]

Moreover, when a party foregoes or dismisses its appeal without settlement, it is clear that res judicata and collat-

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[11] Izumi's sales contracts with Sears require Izumi to hold harmless and indemnify Sears from and against all claims, actions, liabilities, losses, costs and expenses arising out of any actual or alleged infringement of any patent, trademark or copyright by the shavers furnished by Izumi, or in any unfair competition involving the products.

[12] *Ringsby Truck Lines*, 686 F.2d at 722; *Center for Science in the Pub. Interest v. Regan*, 727 F.2d 1161, 1166 (D.C. Cir. 1984). *See also, United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988), where the court denied vacatur in the circumstance when the appeal became moot as a result of the Government's substantial compliance with the terms of the appealed decision. *Accord Constangy, Brooks & Smith v. National Labor Rel. Bd.*, 851 F.2d 839, 842 (6th Cir. 1988); *Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987). In *Garde*, the court held that, "[t]he distinction between litigants who are and are not responsible for the circumstances that render the case moot is important. We do not wish to encourage litigants who are dissatisfied with the decision of the trial court 'to have them wiped from the books' by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision." *Garde* at 1311.

eral estoppel applies to that unreviewed judgment.[13] It is no more unfair to apply claim or issue preclusion where parties voluntarily forego appellate review following settlement. As one court has noted:

> *Munsingwear* holds that the judgment in a moot case should be vacated to relieve the parties of collateral consequences when they were unable to obtain appellate review. The [appellants here] were not disabled from obtaining review; they have simply chosen, for reasons they deem sufficient, to forego the entitlement they possess.[14]

In the present case, the Illinois court concluded that Philips had had a full and fair opportunity to litigate its trade dress claim in Florida and, therefore, applied collateral estoppel to preclude Philips from relitigating that claim (Pet. A28-30). Philips should not be able to escape the Illinois court's determination simply by settling its dispute with Windmere. However, the Federal Circuit's order vacating the Florida judgment erroneously permitted Philips to do just that.

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[13] *See Munsingwear*, 340 U.S. at 39; *Ringsby*, 686 F.2d at 722. In any event, res judicata or collateral estoppel take effect upon final judgment whether or not an appeal is taken. 1B James W. Moore et al., *Moore's Federal Practice* ¶0.416[3] at p. 521-522 (2d ed. 1993).

[14] *Memorial Hosp.*, 862 F.2d at 1301. *See also Clarendon*, 936 F.2d at 130, where the Third Circuit expressed its approval of the approach taken in *Memorial Hospital*, viewing *Munsingwear* as only dealing with an appeal mooted by circumstances beyond either party's control so that the parties are unable to obtain appellate review. *Id.* at 130. The court in *Clarendon* regarded *Karcher*, where this Court held vacatur to be inapplicable, as bearing a closer resemblance to settlement than *Musingwear*. *Id.*

2. The Federal Circuit's Order Burdens Not Only Izumi and Sears, But the Judicial System As Well

The Federal Circuit's order also unnecessarily burdens the judiciary by requiring the federal courts to expend time, money and effort to adjudicate issues already resolved by another court. Today, the federal judiciary is in the midst of a crisis. The volume[15] and cost[16] of litigation continue to increase. At the same time, the the resources available to the courts have dwindled.[17] The Federal Circuit's order, which erased the Florida judgment entered after two lengthy and costly jury trials and which paves the way for Philips to require yet another district court and jury to hear its claims, only adds to the burden on the judicial system.

The Federal Circuit's vacatur practice plainly does not promote judicial efficiency in a case such as this where there is related litigation pending. The interest of judicial economy will not be served if scarce judicial resources have to be spent to litigate issues yet another

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[15] The current case load crisis and its impact are well recognized. *See, e.g.*, Federal Courts Study Comm'n, *Report of the Federal Courts Study Comm'n*, Admin. Office of the United States Courts (April 2, 1990); Civil Justice Reform Act of 1990, S. Rep. No. 416, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802.

[16] Each day of a civil jury trial has been determined to cost a district court over $1,600 per day without a jury and over $2,700 a day with a jury. Budget Dev. Branch, Admin. Office of the United States Courts, *Daily Cost of a Civil Trial* (February 12, 1992) (on the file with the Budget Dev. Branch).

[17] The tremendous burden on the judicial system was dramatically underscored by the startling announcement that, in the absence of supplemental funding, no civil jury trials would commence in any federal district court starting on May 12, 1993.

time. The Federal Circuit should have considered this factor and concluded that vacatur should not be granted in this case.

Although the decision to grant the Philips/Windmere motion to vacate spared the Federal Circuit from having to decide Philips' appeal, judicial efficiency is not being achieved. Any immediate savings resulting from the Federal Circuit's order would be dwarfed by the resources that the Illinois district court, and other courts, would be required to expend retrying the trade dress claim.

While ostensibly justified as a means of achieving judicial economy by encouraging settlement, the Federal Circuit's automatic vacatur rule may actually have the opposite effect. It does not provide an incentive for settlement *before* a case goes to trial since a party in Philips' position would know that, under the Federal Circuit practice, an unfavorable result could be erased through a post-judgment settlement and request for vacatur, as was done here. On the other hand, if motions to vacate based on settlement are *not* routinely granted, the parties would be encouraged to settle their dispute as early as possible, thereby substantially easing the judiciary's burden.[18] *See Memorial Hospital,* 862 F.2d at 1302 ("[i]f parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision, an outcome our approach encourages").

Moreover, denying the motion to vacate here would not have frustrated the parties' settlement because the

[18]This is especially the case for a party such as Philips which already had lost one jury verdict on its trade dress claim and had been told by the Federal Circuit that Windmere had introduced enough evidence for a jury to find that Philips had violated the antitrust laws (J.A. 61a-65a).

Philips/Windmere Settlement Agreement was not conditioned on the Federal Circuit's granting of their motion to vacate. Thus, the public interest in promoting settlement does not justify the Federal Circuit's practice of automatically vacating judgments when the parties settle, especially in this case.

3. Vacatur Conflicts With the Interests of Justice in the Present Case

As this Court has recognized, there is a strong public interest in the finality of judgments. Allowing parties to obtain vacatur on demand, as in the present case, and to thereby erase judgments that have been entered after careful deliberation by courts and juries, has profound implications for the public interest in finality. Indeed, some commentators have criticized the practice.[19]

The Seventh Circuit noted in *Memorial Hospital* that:

> When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.

862 F.2d at 1302.

[19]*See* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur,* 76 Cornell L. Rev. 589 (1991); Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments,* 96 Yale L.J. 860, 867 (1987) ("[c]ircumventing preclusion by vacating existing judgments threatens the public interests in finality of judgments, judicial economy, legitimacy of the legal system, and consistency.")

In addition to depriving the public of judicial precedents created at substantial cost to the public, the Federal Circuit's order is contrary to the public interest because of the *nature* of the vacated judgment. For example, the Florida judgment holding that Philips' trade dress is legally functional and thus unprotectable is steeped in the public interest. Unpatented designs that are legally functional are in the public domain, and any and all competitors, including Izumi, Windmere, Sears and others, may copy them.[20] *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 152-53 (1989). The Federal Circuit's order, however, grants Philips' trade dress a reprieve from finally being adjudged to be in the public domain, casts a shadow over Izumi's and other's right to make and sell their rotary shavers in competition with Philips, and thus potentially deprives consumers of the well-known benefits of vigorous competition – more and better products to choose from and lower prices.[21]

The Federal Circuit failed to credit these important public interests when it vacated the Florida judgment. Rather, the circuit court, in rejecting Izumi's opposition

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[20] *See Wang Lab., Inc. v. Toshiba Corp.*, 793 F. Supp. 676, 678 (E.D. Va. 1992), where following the Federal Circuit's vacatur of a judgment of patent invalidity, the district court expressed its concern that vacating the judgment, at the request of the parties who settle, and without reviewing the merits of the case, may result in an invalid patent being "foisted off on the public and left to distort the market." Here, the Federal Circuit's grant of the Philips/Windmere motion to vacate has a similar effect because it may result in an invalid trade dress claim being "foisted off on the public and left to distort the market."

[21] Likewise steeped in the public interest is the Florida judgment holding that Philips had violated the antitrust laws by creating artificial barriers to full and fair competition from Windmere and other potential distributors of rotary shavers.

to the motion to vacate, subordinated the interests and rights of the public to Philips' and Windmere's private commercial and strategic interests.

In vacating the judgment of trade dress invalidity and antitrust violation, the Federal Circuit permitted the losing party, Philips, to re-erect formidable barriers to competition in the multi-million dollar rotary shaver industry simply because it had agreed to pay almost two-thirds of an $86 million judgment against it, thereby settling its dispute with Windmere. The Federal Circuit was in error in disregarding the effects of vacatur on the public interest.

In sum, the circuit courts should *not* routinely grant motions to vacate on settlement, and the Federal Circuit should not have done so here. Rather, the Federal Circuit should have considered such relevant factors as Izumi's interest in preserving the Florida judgments, the impact of vacatur on Izumi and Sears in Illinois litigation, the prospect of additional trials of issues already decided in Florida at great cost, and the public interest in preserving the finality of judgments of trade dress invalidity and antitrust violation. The Federal Circuit should have balanced these important interests against Philips' private interest in erasing the unfavorable judgments rendered in Florida and in continuing litigation against Izumi and its customers.

In fact, there is no good reason to grant the Philips/Windmere motion to vacate, and every reason to deny it. Had the Federal Circuit weighed these competing interests, it could not reasonably have concluded that vacatur is appropriate.

CONCLUSION

For the reasons given herein, the Court is respectfully requested to reverse the decision of the Federal Circuit and order the Federal Circuit to deny the Philips/Windmere motion to vacate and to reinstate the Florida district court judgment.

Respectfully submitted,

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